

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1192

77-1193

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TO BE FILED BY
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Bp/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

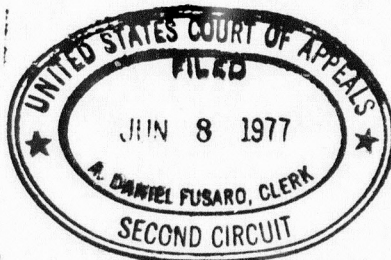
JOSE ROSA, JOSE VEGA, and
RAFAEL RODRIQUEZ,

Defendants-Appellants.

Docket No. 77-1192
Docket No. 77-1193
Docket No. 77-1219

BRIEF FOR APPELLANT
JOSE VEGA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT
JOSE VEGA

=====

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the warrantless search of co-defendant Rosa's apartment was not justified by exigent circumstances or by consent, and the evidence seized must be suppressed.
2. Whether the defense was entitled to examine the informant, who provided the only information pertaining to the

presence of heroin in the apartment, with regard to the content of his information.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable William C. Conner, U.S.D.J.) entered on April 21, 1977, convicting appellant Jose Vega, after a trial based on the record of the suppression hearing and stipulated facts, of possession with intent to distribute 241.92 grams of heroin hydrochloride (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)). Appellant Vega was sentenced to three years' imprisonment and three years' parole to be served upon his release (21 U.S.C. §841(b)(1)(A)). Bail was continued pending appeal.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Jose Vega and co-defendants Jose Rosa and Rafael Rodriguez were jointly indicted for conspiracy to distribute narcotic drugs, possession with intent to distribute 241.92

grams of heroin hydrochloride, and possession with intent to distribute 60.78 grams of heroin hydrochloride. All three defendants moved to suppress evidence which had been seized pursuant to a warrantless search of Mr. Rosa's apartment, and a hearing was conducted on September 30, 1976. Judge William C. Conner issued a written decision denying the motion to suppress on November 10, 1976. At proceedings on January 5, 1977 (Mr. Rosa and Mr. Rodriguez), and on January 10, 1977 (appellant Vega), the defendants waived jury trials and agreed to be tried on the record of the suppression hearing with several additional stipulations. The court found the three defendants guilty under the second count of the indictment (possession with intent to distribute 241.92 grams of heroin hydrochloride) on January 13, 1977. Appellant Vega appeared for sentencing on April 21, 1977. Upon defense motion and with the Government's consent, the first and third counts of the indictment were dismissed; on Count Two, the court imposed a sentence of three years, with an additional parole term of three years (21 U.S.C. §841).*

*Mr. Rosa and Mr. Rodriguez were sentenced on March 3, 1977; Mr. Rosa received the same sentence as appellant Vega (three years plus three years' parole), while Mr. Rodriguez received a suspended sentence with three years' probation. Counts One and Three of the indictment were dismissed as to both defendants.

A. The Evidence Adduced at the Suppression Hearing

Prior to March 30, 1976, Emilio Garcia, a special agent with the Drug Enforcement Administration ("DEA") received information about narcotics traffic in the Rios Piedro Social Club, located on 105th Street between Second and Third Avenues, from a man he had arrested several months previously and had converted into an informant (H.20, 25*). On March 31, 1976, at approximately 9:30 a.m., Agent Garcia met the informant at DEA headquarters. The informant stated that he had been with two individuals named "Pipo" and "Angel" (allegedly Mr. Rosa and appellant Vega, respectively) at the social club during the early hours of March 31, and had "seen them receive approximately one-eighth kilogram of heroin, which they had stated to him they were going to cut and distribute before 11:00 a.m. that morning to have it sold on the streets" (H.26).** A report of the investigation prepared by the DEA, admitted in evidence on a defense motion (H.163), showed that Agent Fiano (who had been transferred and did not testify) had been advised of the impending heroin distribution by the informant at 8:00 a.m., an hour and a half before Agent Garcia received this in-

*Numerical references preceded by "H" are to the minutes of the suppression hearing.

**The witness also testified that his informant's information was not based on what he had seen, but what "Mr. Rosa told him ... in the social club" (H.29). Agent Garcia later disavowed this testimony. (H.156).

formation and planned the actions to be taken by the agents (Exhibit 3501; see H.122, 151).*

No search warrant was sought; Agent Garcia, noting that the information "explicitly" indicated that the drugs would be distributed at 11:00 a.m., feared the delay because a search warrant took between five and six hours to obtain, with an absolute minimum of three hours (H.31). Instead, the agent devised a plan in which the informant was to be sent to Mr. Rosa's apartment, wired with an alert system; "if he saw the drugs, he would touch the signal and subsequently we would rush up a few minutes later" (H.31). They also arranged a back-up signal in the event the electronic signal failed. The informant was driven to the vicinity of Mr. Rosa's apartment, which took approximately 35 minutes (H.175). Though the DEA report shows that the agents left DEA headquarters at 10:40 a.m. (Exhibit 3501; H.175-176), Agent Garcia testified that the informant entered the building at 10:15 or 10:30 a.m. (H.33). Agent Garcia and his fellow agents waited outside for between an hour and a half and an hour and 45 minutes; at about noon, having received the secondary signal (the electronic signal malfunctioned), the assault was made.

*Agent Fiano was also present at the 9:30 a.m. meeting (H.30).

Agent Garcia was joined by Agents Joura and Levine, who were dressed as priests, and they walked up the four flights of stairs, Agent Levine in front and Agent Joura in the rear (T.35, 40). As they reached the top, Agent Garcia noticed that the door was slightly ajar -- five or six inches -- and that an unnamed individual appeared to be doing some work on the door. As the agents approached the door, Mr. Rosa attempted to impede their entry by closing the door, but the agents, overcoming this effort, rushed into the apartment, displaying their guns and shields. Upon entering, Agent Garcia observed several glassine and tinfoil envelopes on the kitchen table (H.35-37). He had not seen these items before gaining entry (H.39)

Among the people in the kitchen were Mr. Rosa and Mr. Rodriguez (H.38). Agent Joura brought appellant Vega into the kitchen from the living room, where Mr. Vega had been sleeping (H.41). All persons were searched, and a quantity of drugs wrapped in tinfoil packets was taken from Mr. Rodriguez (H.45). After Mr. Rosa allegedly exclaimed "it is all mine," he and the other suspects were given notice of their rights; then Agent Levine asked Mr. Rosa, who was handcuffed, if he had any more narcotics in the apartment, and "Mr. [Rosa] stated that he did and he would get them for us as long as we didn't break the place up," a misconception Agent Garcia did not correct (H.46-48, 51). What followed was an unlimited search of the entire apartment -- first by Agents Levine and Garcia (joined by Mr. Rosa), who seized a quantity of heroin and

a variety of drug-related paraphernalia from a dresser drawer in the bedroom,* then by a larger group of agents, who seized a quantity of money, a number of personal papers, and a metal box containing sundry devices used in narcotics processing from locations throughout the apartment (H.48-60).

Much of the cross-examination of Agent Garcia concentrated on inconsistencies between his testimony and three written statements -- the DEA report of investigation (Exhibit 3501), the DEA laboratory report (Exhibit D), and the affidavit in support of the complaint sworn to before a United States Magistrate (Exhibit C). The DEA report of investigation raised questions concerning Agent Garcia's claim that the failure to obtain a warrant arose from his fear that the drugs were to be dispersed at 11:00 a.m. Contrary to Garcia's testimony that he and his brother officers arrived at Mr. Rosa's apartment, and that the informant was inside that apartment, between 10:15 and 10:30 a.m., the report showed that they left DEA headquarters at 10:40 a.m., which, given the 35-minute ride, would have brought them to Mr. Rosa's apartment a quarter-hour after the 11:00 a.m. deadline (H.175-176). The DEA lab report raised questions concerning Agent Garcia's description of the search of the apartment. The report failed to mention that any evidence had been seized from the kitchen table, and, contrary to Agent Garcia's

*These items, found in a box, were initially placed on the kitchen table and commingled with the other items which had previously been obtained (H.50-51).

testimony that certain specific items had been taken from the kitchen table at the outset of the search, the laboratory report reflected that those very items had been seized from the bedroom dresser (H.159-162).

Finally, the agent's affidavit in support of the complaint sworn to before the United States Magistrate raised questions concerning the accuracy of Agent Garcia's account of the informant's information. There were notable discrepancies between the affidavit and the agent's testimony: the affidavit indicated that another agent rather than Agent Garcia had spoken to the informant; that the drugs were to be distributed "in the early hours of March 31" rather than at 11:00 a.m.; that the defendants had "purchased" rather than "received" a quantity of heroin; and that this purchase occurred at Mr. Rosa's apartment rather than at the social club (H.156-157, 166, 172-173). The inconsistent affidavit statements were explained by Agent Garcia as relating to an entirely different transaction, involving a different transfer of an identical quantity of heroin to the defendants, which the agent learned of well after the arrest:

Subsequent to [the day of arrest] I was advised by the informant he had also been present on March 30th in the afternoon when these individuals had received an eighth kilogram of heroin from I think the same individual at their apartment, 244 East 106th Street.

(H.167).*

*Agent Garcia acknowledged that the March 31 sale of drugs to Mr. Rosa -- the sale which in theory gave rise to the search

Robert Joura, an assistant group supervisor at the DEA, joined Agent Garcia at 9:30 a.m. in the meeting with the informant, and participated in the arrest and search of the defendants at Mr. Rosa's apartment. He recalled that they first arrived at the apartment building at 11:15 or 11:20 a.m. and, after a wait of 45 or 50 minutes, he entered the apartment building with Agents Garcia and Levine (H.85-86). The door to Mr. Rosa's apartment was directly to the right of the stairs on the fourth floor landing, and Agent Joura, shoulder to shoulder with Agent Levine, and followed by Agent Garcia, entered the apartment without hesitation: "Almost as soon as we reached the top of the stairs we were into the apartment" (H.103-108). Before entering, Agent Joura noticed that a man was kneeling by the apartment's door, giving the appearance of working on the door or lock, and as a result, the door was open approximately 45 degrees (H.86, 105-106).* The agents pushed through the partially open door, bringing the kneeling man with them (H.114). Agent Joura continued through the kitchen into the living room, where he discovered appellant Vega asleep on the couch. The agent put his gun to Mr. Vega's head, woke him, and "pulled him up" (H.86-87, 115-116). As Mr. Vega

(Footnote continued from the preceding page)

and which was the only transfer Agent Garcia knew of before the search -- was not mentioned in his affidavit before the United States Magistrate (H.169-171).

*Agent Joura did not indicate that anything inside the apartment was visible through the opening.

arose, a sofa pillow fell to the floor, revealing a hidden .38 caliber pistol which the officer retrieved (H.87-88). Mr. Vega was then taken to the kitchen, and Agent Joura continued the search of the apartment. Shortly thereafter, Mr. Rosa directed him to a paper bag containing a large sum of money, which was secreted behind the living room sofa on the floor (H.89, 120), and to a metal box containing a variety of drug processing devices (H.89-90).

Agent Joura stated that he was not briefed by Agent Fiano concerning the information the latter had been given by the informant at 8:00 a.m. (H.122). Prior to 9:30 a.m., when Agent Joura spoke to the informant, he was aware that some information had been given to another agent, without knowing details (H.121-122). The agent recalled that the least time it had taken him to obtain a search warrant in the Southern District had been an hour and a half (H.126).

Michael Levine, acting group supervisor at the DEA, was also at the 9:30 a.m. meeting. Levine planned the operation and proceeded to Mr. Rosa's apartment building, arriving there between 10:45 and 11:00 a.m. (H.129-131). After an hour, Agent Garcia signaled Levine and Agent Joura, they walked upstairs together, and

[w]hen I got to the top of the stairs, the door was ajar. I went right to the door. As I got to the door, I could see a kitchen table or a table. I could see people and as I came right up to the door I could see glassine type bags and -- what would you

call it -- metallic paper.

(H.132).*

The opening of the door was "a good eight or ten inches" and "[e]nough where I could see two or three people at one time as I came through the door" (H.133-134). Agent Levine stated categorically that no one offered or attempted any resistance to his opening of the door (H.134) and that no one was at or near the door when he arrived (H.135).

Agent Levine estimated that in his experience the least time required to obtain a search warrant in the Southern District had been between four and five hours and that it could take as long as an entire day. He explained that there were "three major variables": the availability of a United States Attorney; the presence of a typist; and the accessibility of a United States Magistrate (H.146-148). Agent Levine noted that seven or eight DEA agents had been utilized in the arrest of the defendants and search of Mr. Rosa's apartment (H.145).

The informant did not testify at the hearing, and was not produced for the defense. At the outset of the hearing, defense counsel requested disclosure of the informant's identity (H.15). The Government opposed the defense motion (H.12-14, 17), and subsequently elicited Agent Garcia's testimony that the informant had told him that "if he was required to testify, his

*The DEA report of investigation prepared by Agent Garcia did not indicate that anyone had seen these items on the table (Exhibit 3501; T.162).

life would be jeopardized" (H.60-62). The court denied the defense's initial request, and noted that it would later determine whether sufficient corroboration of the informant's information had been presented (H.15).*

*The court also prevented defense counsel from determining, during cross-examination of Agent Joura, whether the person kneeling by the open front door was the informant or whether the informant had been instructed to open or remove the lock from the front door (H.106-110). This cross-examination was deemed improper because it was "designed to elicit the identity of the informant" (H.107). The court agreed with the Government's reasoning that the informant's role in opening the door and providing access to and visibility of the apartment was irrelevant under Hoffa v. United States, 385 U.S. 293 (1966) (H.109-110).

B. The Ruling on the Motion to Suppress

The court issued a written ruling denying the motion to suppress all evidence seized in the search of Mr. Rosa's apartment in a memorandum filed November 10, 1976.* The following excerpted rulings are the most pertinent to the issues raised herein.

The court found that the failure to obtain a search warrant prior to conducting the search of Mr. Rosa's apartment did not invalidate the search:

On the basis of the record at bar, this Court concludes that the instant case stands among those "jealously and carefully drawn" situations, Jones v. United States, 357 U.S. 493, 499 (1958), that validate warrantless searches. For here the agents believed -- and more to the present point, this Court is convinced of the reasonableness of their belief -- that the delay entailed in obtaining a warrant would in all likelihood have prevented them from "arresting" not defendants alone, but rather, the "destruction of evidence" as well. Schmerber v. California, 384 U.S. 757, 770 (1966). "Destruction" in the present case would have been of the most damaging nature, that is, commercial distribution.

Although defendants argue with some vigor that a warrant might have been secured in the present case without such cost, the testimony elicited at the hearing tends to prove otherwise. Thus, according to Levine, the engineer of the March 31, 1976 operation, it had been his experience that a warrant could not be obtained in the Southern District of New York in less than four or five hours under the

*The complete text of the court's written decision is set forth as C to the separate appendix to appellant Vega's brief.

the most efficient circumstances; under average circumstances, Levine testified, a warrant could not be had in this district in less than a day. In view of the reported imminence of the narcotics sales, Levine reasonably enough declined to initiate an application for a warrant, an application that would have been -- according to Levine's own experienced lights -- no more than a futile exercise.

(Appendix C at 11-12).

The court determined that the search of the entire apartment, subsequent to the arrests of the defendants in the kitchen, was justified under the consent doctrine:

That the above-recited guidelines are not always easily applied is unhappily demonstrated by the case at bar. After all, the search at issue transpired in a context which might ordinarily and readily be deemed inherently coercive, following as it did the sudden intrusion by armed officers into the Rosa residence. The arrests were, to be sure, speedily effected, but probably no less disquieting for such expedition.

Nonetheless, this Court is impelled to the conclusion that Rosa's consent to the search of his apartment was offered freely, knowingly, and without equivocation. That conclusion is founded, necessarily, upon the surrounding circumstances in their entirety. Although armed, the agents do not appear to have threatened Rosa, either expressly or impliedly; nor did they practice any form of deception upon him. Rather, the agents addressed Rosa in words of inquiry and request. Moreover, the Miranda warnings had been administered to Rosa in his native language. In word and action, Rosa appeared to have been alert, certainly enough so to have understood the Miranda admonition respecting his right not to incriminate himself; indeed, Rosa had summoned enough wit -- and pluck -- to condition the search upon the officers' care not to disturb his household effects unnecessarily. Added to all the above were Rosa's spontaneous

declarations of guilt and his affirmative assistance in the search; as Garcia noted at the hearing, "Mr. Rosa was with us as we looked around, after he gave us consent. He was with us constantly." See United States v. Smith, supra, at 663-664. Thus, all of the relevant evidence, as a totality, reflects a voluntary consent on Rosa's part to the search and consequent seizures.

(Appendix C at 15-16).

Additionally, the court reaffirmed its ruling that the informant's identity was properly withheld by the Government:

In view of the facts as recited above, such non-disclosure is not fatal to the Government's position herein, whether that position be measured against the Second Circuit's most recent pronouncement on the subject, i.e., that "disclosure of an informant's identity is required only when the existence of probable cause depends entirely on the reliability of the informant," id. (emphasis in original), or by the Second Circuit's earlier observations that "disclosure [is] required only when the informant's story constituted 'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause," United States v. Comissiong, 429 F.2d 834, 838-839 (2d Cir. 1970).

(Appendix at 9-10).

POINT I

THE WARRANTLESS SEARCH OF CO-DEFENDANT
ROSA'S APARTMENT WAS NOT JUSTIFIED BY
EXIGENT CIRCUMSTANCES OR BY CONSENT,
AND THE EVIDENCE SEIZED MUST BE SUP-
PRESSED.

A. Neither the entry into nor search of Mr. Rosa's apartment without a warrant was excusable under the exigent circumstance doctrine, because the agents had sufficient opportunity and manpower to obtain a warrant while maintaining surveillance adequate to prevent distribution of the heroin in the interim.

At 8:00 a.m., when Agent Fiano was informed that a quantity of heroin was present in an apartment and about to be distributed, he might have alerted several border agents, hurried to the location of the drugs, and, without a warrant due to the exigencies, entered and arrested the suspects. Or, if he believed that immediate action was not absolutely imperative, that the location of the drugs would allow effective surveillance of the premises, and that a spy could actually be placed in close proximity to the drugs to monitor any movement, he might pursue a warrant while making arrangements for surveillance by a number of other agents. Agent Fiano and his fellow agents followed neither course, but drew on incompatible aspects of each. While claiming that the exigencies of the situation justified their lack of a warrant, as in the first

scenario, they casually proceeded to the location in question, arriving there a quarter hour after the drugs were supposed to have been distributed, and then waited outside the building for an hour or more. Equally, in the fashion of the second scenario, they involved seven or eight agents in surveillance of the premises, planted an informant inside the apartment, and eliminated the danger of undetected distribution of the heroin, but they then failed to take steps to secure a warrant.

These incongruous actions reveal the true nature of this warrantless arrest and search: an unconstitutional response to a situation involving no exigencies or, at best, potential exigencies which, through the surveillance employed, could have been met satisfactorily until a warrant was obtained. The various estimates of time needed to secure a warrant in the Southern District were a diversion; no testifying agent estimated a time interval which would have precluded obtaining a warrant in time to conduct this precise search, and the agents' claim that possible delay excepted their actions from the warrant requirement would reduce this protection to an unobserved formality, since no warrant is available instantaneously.

The facts in this case do not establish that an attempt to obtain a warrant before conducting the arrests and search would have compromised the agents' efforts to prevent distribution of the heroin. The DEA assigned seven or eight agents to this case by 10:30 a.m.; thus, had Agent Garcia directed his energies to obtaining a warrant, full surveillance, with the informant

inside the apartment, could have been maintained while obeying the warrant requirement. (See United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974).) If distribution of the drugs appeared imminent before the warrant was secured, the agents could effect the arrest and search immediately, under genuinely exigent circumstances. (See United States v. Rubin, 474 F.2d 262, 270 (3rd Cir. 1973).) Moreover, the facts suggest that, at the time the arrests and search were conducted, distribution was not yet a danger; the drugs were still hidden in a dresser and appellant Vega was sound asleep, and though the informant had given his signal, this indicated only that the narcotics were present -- not that they were to be distributed. Thus, even if a warrant had been obtained only after noon, the surveilling agents -- always having the option to act upon an actual exigency -- could have succeeded in preventing distribution of the drugs while awaiting the warrant.

This case is like Johnson v. United States, 333 U.S. 10, 14-15 (1948), in one notable respect:

No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement.*

*See also Vale v. Louisiana, 399 U.S. 30, 34 (1970); McDonald v. United States, 335 U.S. 451, 454-456 (1948); Agnello v. United States, 269 U.S. 20, 33 (1925); Carroll v. United States, 267 U.S. 132, 153 (1925).

Anticipated delay has been recognized as a facet of exigent circumstances as applied to dwellings when it renders a warrant effectively unobtainable. Thus, in United States ex rel. Cardaio v. Casscles, 446 F.2d 632, 638 (2d Cir. 1971), this Court found a warrantless arrest and search of a home lawful because the officers first obtained information after 5:00 p.m., making it impossible to obtain a warrant until the following day. Similarly, in United States v. Davis, 461 F.2d 1026, 1031 (3rd Cir. 1972) and in Dorman v. United States, 435 F.2d 385, 394-395 (D.C. Cir. 1970) (en banc), the difficulties of obtaining a warrant at night after the workday were recognized as a valid excuse to the warrant requirement for arrests. In the case at bar, however, the information was known to one agent at 8:00 a.m. and several others at 9:30 a.m. Recalling Agent Levine's testimony defining the three variables for obtaining a warrant -- a United States Attorney, a secretary, and a United States Magistrate -- all three would have been available at the outset of the working day.*

But even if the agents were justified in disregarding the warrant requirement at the inception, they were obliged to obtain a search warrant before searching the premises once the defendants had been gathered in the kitchen and placed under arrest:

*March 31, 1976 was a Wednesday.

[N]othing in the Fourth Amendment remotely implies that officers who, for the purpose of arrest, have intruded, albeit lawfully, upon the privacy of an individual without an arrest warrant, may further invade that privacy by searching without a warrant...

United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973); accord, United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976); United States v. Artieri, 491 F.2d 440, 445 (2d Cir. 1974); United States v. Gamble, 473 F.2d 1274, 1276 (7th Cir. 1973); see generally Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969). Numerous agents were present, and several could have guarded the premises while a search warrant was sought. The fact that the agents relied on Mr. Rosa's misconception regarding their authority to search (see Part B, infra) rather than proceeded directly to search does not alter the fact that they accomplished their purpose -- an immediate and unlimited search of the entire apartment -- by disregarding the warrant requirement.

The preference embodied in the Fourth Amendment for searches approved by a magistrate is seriously challenged by this case. It appears that the failure to obtain a warrant is, to some extent, attributable to a willful and obstinate aversion to the warrant procedure; it also appears that this attitude arises from what was perceived to be an inefficiency connected with securing a warrant. Whether or not this is so, the warrant requirement must be respected. The failure to obtain a search warrant renders the entry, the arrests, the search, and the seizures unlawful.

B. Mr. Rosa's capitulation, rather than his consent, preceded the agents' extensive post-arrest search of the apartment, because the agents disingenuously allowed Mr. Rosa to believe that unless he cooperated they would "break the place up" and withheld the fact that they lacked authority to search.

Should this Court conclude that the initial warrantless entry into Mr. Rosa's apartment was justified by exigent circumstances but that the extensive search of the apartment could proceed only with a warrant, no alternative justification for the warrantless search can be found under the consent doctrine. Mr. Rosa's cooperation in the ensuing search was the product not of an "essentially free and unrestrained choice," Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), but of a willful deception by the Government agents.

Mr. Rosa premised his cooperation upon his fear that the alternative would be a wide-ranging search in which the agents would "break the place up." Though the agents could not lawfully do this, Mr. Rosa's belief that they would rendered his cooperation not a voluntary consent but a submission to a claim of lawful authority.* Analogously, in Bumper v. North

*Though the agents did not assert an authority to conduct an unlimited search, they also did not correct Mr. Rosa's misconception. By their silence, they would have appeared to Mr. Rosa to have confirmed his fears regarding the extent of their authority.

Carolina, 391 U.S. 543, 550 (1968), the Court held that permission to search elicited after presentation of a search warrant (later held invalid) was not consent:

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion -- albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Accord, Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921); cf. United States v. Watson, 423 U.S. 411, 424-425 (1976). In the case at bar, the agents' exploitation of Mr. Rosa's fears and misconceptions constituted coercion.

The court's decision below, in finding consent, reflects one substantial omission and one substantial error. As to the omission, the court failed to assess the effect of Mr. Rosa's having been arrested and placed in handcuffs. "[A]rrest carries its own aura of coercion [and] the burden upon the Government to show voluntary consent is 'particularly heavy.'" United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973) [quoting Gorman v. United States, 380 F.2d 158, 163 (1st Cir. 1967)]. The court's error is seen in the following conclusion:

"[N]or did [the agents] practice any form of deception upon [Mr. Rosa]." (Appendix C at 15.) This statement disregards the coercive deception of permitting Mr. Rosa to believe that the only alternative to his cooperation would be the destruction

of his apartment; this, as has been noted, was the very fear whose exploitation yielded Mr. Rosa's cooperation.

Thus, just as exigent circumstances cannot be advanced as a legitimate basis for the search of the entire apartment, consent fails as a justification. The seizures were illegal and the evidence should be suppressed.

POINT II

THE DEFENSE WAS ENTITLED TO EXAMINE
THE INFORMANT, WHO PROVIDED THE ONLY
INFORMATION PERTAINING TO THE PRESENCE
OF HEROIN IN THE APARTMENT, WITH REGARD
TO THE CONTENT OF HIS INFORMATION.

The informant alone directed the Government's attention to Jose Vega and his co-defendant. The informant alone was alleged to have observed Mr. Vega and his co-defendant in possession of heroin. The informant alone located this heroin in Mr. Rosa's apartment on the date in question. And the informant alone suggested that this heroin would disappear -- distributed on the street -- by 11:00 a.m. that morning. The agents relied exclusively on the informant's information to establish not only probable cause for their search but the exigent circumstances under which they dispensed with a warrant (but see Point I, supra); no independent observations by the Government agents supplemented this information.

At the same time, the agent who related this information gave an inconsistent account of critical transactions, casting doubt upon the accuracy and truthfulness of his version of the informant's representations. Agent Garcia, contrary to his testimony below that the informant had actually seen the defendants in possession of a quantity of heroin in the social club, testified at the same proceedings that the informant had merely been "told" of the drug delivery by Mr. Rosa (H 29).

The agent, consistent with the claim that the informant's information indicated the drugs were to be dispersed by 11:00 a.m., testified that he arrived at Mr. Rosa's building before 10:15 a.m.; but this was belied by the DEA report of investigation which revealed that the agents left DEA headquarters at 10:40 a.m., bringing them to the apartment building after the drugs were to have been distributed -- peculiar tactics unless the informant's information did not specify 11:00 a.m. as the deadline.

Most notably, in his post-arrest affidavit in support of the complaint sworn to before the United States Magistrate, Agent Garcia recited the details provided by the informant upon which he acted; this statement, in total conflict with the agent's hearing testimony, indicated that the informant presented his information not to Agent Garcia but to another agent, and showed that the suspected individuals had "purchased" rather than "received" a quantity of heroin, at Mr. Rosa's apartment rather than at the social club, on March 30 instead of March 31, and to be distributed "in the early hours of March 31" rather than at 11:00 a.m. Agent Garcia sought to explain these discrepancies by revealing, for the first time on cross-examination, that the informant had advised him of not one but two transfers of drugs to the defendants. This "two-transaction explanation" has every appearance of an effort to obscure significant contradictions which cast doubt on the accuracy and truthfulness of Agent Garcia's account of the informant's statements. The agent's

explanation is further discredited upon consideration of the fact that the transfer described by Agent Garcia in his affidavit in support of the complaint -- purportedly a description of the most pertinent facts known to the officer -- was not the one upon which he relied for probable cause to arrest and search, but the one which he learned of only after the arrest and search. This anomaly casts further doubt on Agent Garcia's account of the informant's actual information.

Thus, the hearsay testimony of Agent Garcia was a less than adequate substitute for the testimony of the informant. Though the existence of probable cause must be determined after resolving conflicts to the benefit of the Government, the propriety of production of the informant must be resolved with full regard for the conflicts in the Government's evidence; for the need for the informant's testimony arises when there is a genuine question whether the relating agent is a believable witness. See McCray v. Illinois, 386 U.S. 300, 313 (1967); United States v. Comissiong, 429 F.2d 834, 837-838 (2d Cir. 1970); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964). Moreso, production of the informant was compelled here because the agents contributed no independent information justifying an arrest and search while the informant's communications were "essential to the establishment of probable cause" -- that is, "'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause." United States v. Tucker, 380 F.2d 206, 212 (2d Cir. 1967); see United

States v. Comissiong, supra, 429 F.2d at 838-839; see also United States v. Edmonds, 535 F.2d 714, 720 (2d Cir. 1976). Since the informant's story was entirely responsible for the finding of probable cause, and since Agent Garcia's hearsay testimony relating that information was less than credible, production of the informant is mandated.

Perhaps a final note should be addressed to the Government's basis for opposing production of the informant. The Government elicited Agent Garcia's recollection that the informant feared that "if he was required to testify, his life would be jeopardized" (H 62). Though an informant's safety is a major concern recognized in United States v. Comissiong, supra, 429 F.2d at 839, and United States v. Tucker, supra, 380 F.2d at 213, the Government's claim in this case must fail for total lack of support in the record. The actual defendants involved were not demonstrably dangerous individuals; for example, the record indicates that appellant Vega, thirty-five years old, had no significant criminal record. Certainly, the Government made no effort, beyond eliciting Agent Garcia's hearsay allegation of the informant's fear, to assert their opposition to production on the basis of danger to the informant. Nor could the Government claim that production of the informant compromised his future utility. The informant was present in the apartment before and during the arrest and search, and as the court itself recognized, the process of elimination revealed his identity. His production, therefore, would not defeat his

usefulness any more than it had been defeated by the arrest and search procedure employed. While the Government's claim would be stronger if the informant had not been disclosed or produced at any of the other cases in which he was involved, no evidence was produced by the Government that in these other cases the secret of the informant's identity had been maintained.

Under these circumstances, the judgment should be reversed and the case remanded for a further hearing on the motion to suppress, at which the informant will be produced for examination by the defense.

POINT III

PURSUANT TO FED.R.APP.PROC. 28(i),
APPELLANT VEGA ADOPTS POINT III AND
ALL OTHER RELEVANT AND CONSISTENT
POINTS OF CO-APPELLANT JOSE ROSA.

Appellant Vega hereby adopts co-appellant Jose Rosa's argument (Point III) that at the time of the offense charged in the indictment, there existed no validly promulgated schedule of narcotic drugs. Additionally, appellant Vega adopts all other relevant and consistent points of his co-appellant.

Conclusion

For the foregoing reasons, the judgment of the district court must be reversed and the indictment dismissed or, alternatively, a new hearing must be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 8, 1977

I certify that a ^{corrected} copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

Ann L. G. Bennett

